

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WISCONSIN
4

5 ALVIN BALDUS, CARLENE BECHEN, ELVIRA)
6 BUMPUS, RONALD BIENDSEIL, LESLIE W.)
7 DAVIS, III, BRETT ECKSTEIN, GLORIA)
8 ROGERS, RICHARD KRESBACH, ROCHELLE)
9 MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE)
10 SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS)
11 THYSSSEN, CINDY BARBERA, RON BOONE, VERA)
12 BOONE, EVANJELINA CLEERMAN, SHEILA)
13 COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON,) Case No. 11-CV-562
14 RICHARD LANGE, and GLADYS MANZANET,) JPS-DPW-RMD
15)
16 Plaintiffs,) Milwaukee, Wisconsin
17)
18 TAMMY BALDWIN, GWENDOLYNNE MOORE and) February 21, 2012
19 RONALD KIND,) 8:30 a.m.
20)
21 Intervenor-Plaintiffs,) **VOLUME II**
22) **P.M. SESSION**
23)
24 v.)
25)
26 Members of the Wisconsin Government)
27 Accountability Board, each only in his)
28 official capacity: MICHAEL BRENNAN,)
29 DAVID DEININGER, GERALD NICHOL, THOMAS)
30 CANE, THOMAS BARLAND, and TIMOTHY VOCKE,)
31 and KEVIN KENNEDY, Director and General)
32 Counsel for the Wisconsin Government)
33 Accountability Board,)
34)
35 Defendants,)
36)
37 (caption continued on next page))

22 **TRANSCRIPT OF COURT TRIAL**

23 BEFORE DIANE WOOD, CIRCUIT JUDGE, ROBERT DOW, JR., DISTRICT
24 JUDGE, and J. P. STADTMUELLER, DISTRICT JUDGE

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F. JAMES SENSENBRENNER, JR., THOMAS E.)
PETRI, PAUL D. RYAN, JR., REID J.)
RIBBLE, and SEAN P. DUFFY,)

Intervenor-Defendants.)

VOCES DE LA FRONTERA, INC., RAMIRO)
VARA, OLGA VARA, JOSE PEREZ, and)
ERICA RAMIREZ,)

Plaintiffs,)

v.) Case No. 11-CV-1011
JPS-DPW-RMD)

Members of the Wisconsin Government)
Accountability Board, each only in his)
official capacity: MICHAEL BRENNAN,)
DAVID DEININGER, GERALD NICHOL, THOMAS)
CANE, THOMAS BARLAND, and TIMOTHY)
VOCKE, and KEVIN KENNEDY, Director and)
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Defendants.)

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1 P R O C E E D I N G S

2 THE BAILIFF: All rise. Court is now in session,
3 the Honorable Judges J. P. Stadtmueller, Diane P. Wood and
4 Robert M. Dow, Jr., presiding. Please be seated.

5 THE CLERK: The court calls Alvin Baldus, et al,
6 versus Michael Brennan, et al, Case No. 11-CV-562 for the
7 continuation of the court trial. May I please have the
8 appearances of the attorneys appearing in court, beginning with
9 the plaintiffs.

10 MR. POLAND: Good afternoon, Your Honors. Doug
11 Poland, Dustin Brown and Wendy Arends appearing for the Baldus
12 Plaintiffs.

13 MR. EARLE: Peter Earle and Jackie Boynton appearing
14 for the Voces de la Frontera Plaintiffs.

15 MR. HASSETT: Scott Hassett and Jim Olson of Lawton &
16 Cates appearing for the Plaintiff Intervenors.

17 MS. LAZAR: Good afternoon, Your Honor. Assistant
18 Attorney General Maria Lazar. Also appearing is Dan Kelly and
19 Patrick Hodan for the Defendants, the Government Accountability
20 Board and its Director and General Counsel in their official
21 capacity only.

22 MR. SHRINER: Good evening, Your Honor. Thomas L.
23 Shriner, Jr., and Kellen C. Kasper for the Intervenor
24 Defendants.

25 JUDGE STADTMUELLER: Thank you. Good afternoon,

1 Counsel. While you have been conferring with your respective
2 clients, the court has had a busy day beginning the review of
3 the multitude of documents that are before us, and so we are at
4 that point at this hour to learn from counsel where we are with
5 respect to the suggestion that the court made this morning
6 before we recessed. So beginning with you, Ms. Lazar or
7 Mr. Kelly, if you would be so kind to update the court.

8 MS. LAZAR: Thank you, Your Honor. Mr. Kelly will
9 address this point further, Your Honor, this afternoon.

10 MR. KELLY: Your Honor, as you know, we do not
11 represent the Legislature, but we have been in contact with
12 them to discuss the court's comments this morning. We are
13 pleased to report that the Legislature, legislative leaders,
14 were interested in the suggestion that you made, but there was
15 an impediment that we have come across that will prevent them
16 from going forward with this. In particular, the impediment is
17 the Wisconsin Constitution Article 4, Section 3. We have
18 copies of the case. May we approach the bench, Your Honor?

19 JUDGE STADTMUELLER: I think we have already been
20 provided with the cases.

21 MR. KELLY: Thank you.

22 JUDGE STADTMUELLER: State ex rel. Smith versus
23 Zimmerman?

24 MR. KELLY: That's correct, Your Honor. The concern
25 is this. The Wisconsin Supreme Court has ruled there can be

1 only one redistricting per decade following the federal census.
2 The Zimmerman case came up in the context of a legislative
3 attempt to go back and amend a legislative district map
4 subsequent to the first redistricting effort, and the court in
5 no uncertain terms stated that that was beyond legislative
6 authority. In fact, it said that once the Legislature has
7 adopted the redistricting plan, it has exercised and exhausted
8 its full amount of responsibility and authority with respect to
9 redistricting, and that it may not do so again until the
10 following federal census.

11 The only exception that it recognized was the one in
12 the Slauson case, which it did cite in this opinion, and that
13 was when the Legislature is engaged in something completely
14 unrelated to redistricting, but it has the incidental effect of
15 changing a district boundary, that's acceptable, but if there
16 were -- if they were to attempt to pass a law that had the
17 purpose and effect of redistricting, that would be beyond the
18 scope of what the Wisconsin Constitution allows. So in the
19 Zimmerman case the court struck down the legislators attempt to
20 adopt a new district map, or at least a small change to it.

21 So while the Legislature is always open to thoughts
22 on the legislation that it considers and adopts, there is,
23 unfortunately, this impediment to proceeding in that fashion.

24 JUDGE STADTMUELLER: All right. Well, just having
25 been provided with a copy of the decision, I, frankly, am not

1 in a position to agree or disagree with you and the
2 Legislature's analysis, but given the fact that there is a
3 justiciable controversy before the court, I guess where that
4 leaves us is, frankly, to proceed tomorrow with opening
5 statements and the various witnesses that each side expects to
6 call.

7 MR. POLAND: Your Honor, may I be heard?

8 JUDGE STADTMUELLER: Certainly.

9 MR. POLAND: This is Doug Poland for the Baldus
10 plaintiffs.

11 THE WITNESS: Your Honor, we did have a conversation
12 with counsel for the GAB this afternoon. We conferred with the
13 appropriate people, and we understood that the minority
14 legislative leadership was certainly ready, willing and able to
15 engage in these discussions. We conveyed that to counsel for
16 the GAB, and it's my understanding that the minority
17 legislative leadership conveyed that to the majority, as well.

18 Counsel for the GAB provided us with the citation to
19 the Smith versus Zimmerman opinion, and we read it and we
20 informed them that we believe the case is the opposite. The
21 Wisconsin Constitution says that at its first session the
22 Legislature must do this. Well, the Legislature is still in
23 its first session. We believe that it can easily go back and
24 it could redo this. The Legislature has actually said so
25 itself. We have two documents that are marked as trial

1 exhibits, one that was written by a legislative aide which says
2 that the map is a placeholder map; if the Senate comes back as
3 the majority, that was the recall elections last August, we may
4 come back and adjust.

5 There's an email from Mr. Troupis last summer after
6 the maps were adopted by the Legislature on July 20th that says
7 the alternative of simply redrawing within the area remains a
8 real possibility. We think that the Legislature has no doubt
9 that it could do this. We think that there is a good faith
10 effort that ought to be made by both parties to go forth and do
11 this.

12 In addition, we think that to the extent that there
13 is a timing issue here, a problem that we face with proceeding
14 tomorrow, and I believe that Mr. Earle is prepared to address
15 that, if Your Honors are inclined to hear what Mr. Earle has to
16 say.

17 MR. EARLE: May I be heard one more moment on
18 Zimmerman, Your Honor?

19 JUDGE STADTMUELLER: Go ahead.

20 MR. EARLE: The Zimmerman case itself says that it
21 recognized -- it stood for the proposition cited by counsel,
22 but it said both houses of the Legislature passed the bill, the
23 Governor signed it, the Secretary of State published it.

24 JUDGE WOOD: Where are you reading from in the
25 opinion?

1 MR. EARLE: Your Honor, on Page 5 in the right-hand
2 column, it's Paragraphs 2 and 3 combined. It says "...the
3 Legislature adjourned sine die, and the citizens of the state
4 by their action in the referendum brought to pass the condition
5 upon which the finality of the Rosenberry apportionment
6 depended. So the Zimmerman case itself hinged this idea of one
7 time in a decennial cycle on the first session. This reference
8 to the Legislature having adjourned I think is in direct
9 reference to the language of the state constitutional provision
10 itself which says that the decennial reapportionment plan must
11 be done in the first session after the census. So, you know,
12 we --

13 JUDGE WOOD: So you are looking at the first couple
14 of words of Section 3, "As amended November 1910 at their first
15 session?"

16 MR. EARLE: Yes. Yes, Your Honor. Yes, so we do not
17 believe that the Zimmerman case is a significant obstacle. We
18 thought that in the spirit offered by the court in mandating
19 that we confer, that this is something that merited further
20 consideration in an effort to see if we can get around this
21 given the stakes, given the importance that this be done first
22 and foremost in the Legislature in a public way.

23 JUDGE DOW: Did I understand Mr. Kelly to be saying
24 that the Legislature, at least the folks you conferred with,
25 were open to discussion but for this, their interpretation or

1 your interpretation of this Zimmerman case?

2 MR. KELLY: Correct, Your Honor. If I might just
3 respond to Mr. Earle for a moment. Certainly the case didn't
4 recite a history of the Rosenberry Act, but what it relied on
5 is not the fact that the Legislature had gone out of session.
6 What it says, just backing up in that paragraph now, so we are
7 on the same page, left-hand column at the bottom, it says --
8 And this is not the first time, by the way, that the court had
9 addressed this act. It says, "In discussing the Legislature's
10 attempt to change senate districts by Chapter 242, Laws of
11 1953, we stated expressly that under the present state
12 constitution the passage of the Rosenberry Act exercised and
13 exhausted the power of the Legislature to redistrict during the
14 present interval between censuses except in the cases of
15 districts whose boundaries did not preserve the constitutional
16 mandate." So it did not speak to this in terms of sessions, it
17 spoke to it in terms of passage. Act 43 has passed. That is
18 to say the Legislature has exercised and exhausted until the
19 year 2020 the Legislature's authority on the topic of
20 redistricting.

21 JUDGE WOOD: It's not clear to me that that is
22 consistent with the reference to boundaries that didn't observe
23 the constitutional mandate, if you think that this is a 1954
24 decision, since the act before us hasn't taken effect yet. We
25 haven't had the 2012 election yet.

1 MR. KELLY: That's correct, Judge Wood, we have not
2 had the election under the present act, but the Zimmerman court
3 spoke not in terms of having had an election under that map, it
4 spoke in terms of passage of the bill creating those districts.
5 So once the Legislature passed -- enacted the law, that
6 exhausted their authority on the subject.

7 JUDGE STADTMUELLER: Mr. Kelly, what if we follow the
8 balance of that sentence and you and your colleagues in the
9 Legislature agreed that what they enacted did not pass
10 constitutional muster. Are they left saddled with the
11 inability to correct it? Because, in effect, that's what we
12 are theoretically talking about here, is correcting something
13 that may have been wrong in the first instance, without so much
14 as saying so.

15 MR. KELLY: Judge Stadtmueller, we have no question
16 about the court's authority to pass on the constitutionality of
17 Act 43 in terms of the Federal Constitution. If the court were
18 to take the position that Act 43 is invalid under the Federal
19 Constitution, then the act would cease to exist, essentially.
20 Of course, at that point in the later part of the sentence that
21 we read the Legislature would then have authority to go back
22 and adopt a new map, but that's predicated on the court
23 exercising its judicial authority to find the act
24 unconstitutional.

25 The GAB does not believe that the map is

1 unconstitutional, they believe it's perfectly sound, and that
2 is a position that they take wholeheartedly. That's from the
3 top of the Department of Justice on down. That is the position
4 of the GAB, and that is our considered analysis, is that the
5 maps are constitutionally sound. So if the court were to take
6 this step to find it unconstitutional, the Legislature would
7 have the authority to address it, but absent that, there's no
8 authority to revisit the topic before the next census.

9 JUDGE WOOD: But the Supreme Court of Wisconsin would
10 have the authority to decide whether this Wisconsin
11 constitutional language has the drastic comedy in federalism
12 implications that you are attributing to it.

13 MR. KELLY: If I understand your question, it is
14 whether the Wisconsin Supreme Court has the ability to set down
15 the authority saying the Wisconsin Constitution prohibits a
16 second redistricting.

17 JUDGE WOOD: No, actually I was saying the Wisconsin
18 Supreme Court is the institution that has the authority to
19 decide how broadly Smith versus Zimmerman was to be read, and,
20 therefore, what the Wisconsin Constitution requires in this
21 situation.

22 MR. KELLY: That's true. If the Wisconsin Supreme
23 Court were of the mind to revisit this question, they could
24 certainly modify the holding that they have made in Zimmerman.

25 JUDGE WOOD: Or perhaps reinterpret it. So the

1 Wisconsin Supreme Court accepts certifications from the federal
2 courts, does it not?

3 MR. SHRINER: Not from the district court, Your
4 Honor.

5 JUDGE WOOD: Only from --

6 MR. SHRINER: Only from the Court of Appeals or the
7 Supreme Court.

8 JUDGE WOOD: Has it ever considered a three-judge
9 court?

10 MR. SHRINER: No, it doesn't fit. Chapter 821 of the
11 Wisconsin Statutes is very clear on that. The Wisconsin
12 Supreme Court did not adopt the option under the Uniform Act to
13 allow certification for district courts. If I may, the
14 question you asked earlier about the language, just for your
15 information because we're all reading this in a hurry, but
16 there were actually two cases, State ex rel. Smith versus
17 Zimmerman, I think the one you have in front of you, 266, but
18 an earlier one the previous year State ex rel. Thomson versus
19 Zimmerman, 264, which is referred to in here.

20 When the decision referred to boundary problems that
21 render the act unconstitutional, it referred to a separate
22 issue in which some of the districts were not contiguous and,
23 therefore, violated a different provision of the Wisconsin
24 Constitution, and the Wisconsin Supreme Court said in one of
25 these cases that the Legislature could correct that. That was

1 the issue before them.

2 MR. POLAND: Your Honor, if I may, picking up on a
3 point that Judge Stadtmueller had made, if we look at the
4 sentence after that, as well, there's a distinction where the
5 court states, "There is no claim here that the Brown County
6 reapportionment in 1951 did not comply with all constitutional
7 demands." So I think that what we are looking at is a
8 distinction between that case and this case. The court refers
9 to a claim. There certainly is a claim here that the plan in
10 question did not observe -- did not comply with all
11 constitutional demands, and so I think that it does not prevent
12 a barrier. That's a clear distinction between the Smith versus
13 Zimmerman case and the situation we have here.

14 JUDGE DOW: What's the date of the referendum they
15 are referring to? I'm in the same paragraph you guys were in
16 before. "Nothing in the facts now called to our attention
17 disposes us to reverse our statement in the Thomson case,"
18 which I take it is the case that Mr. Shriner was referring to?

19 MR. SHRINER: Yes, Your Honor.

20 THE COURT: "...supra, and to hold that the
21 Rosenberry act was not completed legislation. In the absence
22 of a successful attack upon its constitutionality (not
23 attempted here)," that's the statement you were just picking
24 upon, Mr. Poland?

25 MR. POLAND: Yes.

1 JUDGE DOW: Okay. "...it was a reapportionment,
2 directed by the Constitution to be done once and only once
3 following each federal census, which passed beyond the
4 Legislature's power of revision at the date of the referendum
5 at that time very latest. Is it is not necessary to decide now
6 whether it so passed at an earlier date." What was the date on
7 the referendum?

8 MR. KELLY: Your Honor, if I may.

9 MR. SHRINER: Before '54. It was unusually past the
10 statute, and they said it was subject to a condition.

11 MR. KELLY: The condition was passage of the
12 referendum in November of 1952. That's on Page 2 of the
13 opinion in the right column, second full paragraph towards the
14 end.

15 JUDGE DOW: I'm sorry. I was focusing on the
16 paragraphs, and this information is two pages before. But I
17 guess my question is is there any room in that this date of the
18 referendum, leaving open the question about whether the
19 Legislature's power of revision passed at an earlier date, is
20 there any wiggle room there that would dovetail with this
21 notion of the first session still being open?

22 MR. SHRINER: I think that's the holding in Smith,
23 that there isn't, but you may read it differently. The
24 argument made in Smith was you consider it not having come into
25 effect until the referendum passed, and what the court held in

1 Smith was that it went into effect when it passed, even though
2 it was subject to a later condition, and that then exhausted.

3 MR. KELLY: If I may, the distinction about whether
4 there's a claim, there was a claim in Zimmerman of
5 unconstitutionality, whereas there is here, I don't think
6 that's an operative distinction for a very important reason.
7 If all it took was a claim about constitutionality, not a
8 judgment, but just a claim that a statute is unconstitutional,
9 that would invite a whole segment of litigation. Whenever
10 there was a party who was aggrieved by a statute, wanted it to
11 change and couldn't get it done in the Legislature, but perhaps
12 the Attorney General was friendly to the position, they would
13 simply bring it -- they would bring a lawsuit and then have the
14 Attorney General settle the claim, giving them authority to
15 revisit this. The simple existence of a claim does not open
16 the door to an invasion of the Wisconsin Constitution. There
17 has to be an adjudication.

18 JUDGE STADTMUELLER: All right. Setting this whole
19 issue aside for a moment, Mr. Earle, you wanted to say
20 something about tomorrow. Let's get that out on the table, as
21 well.

22 MR. EARLE: Certainly, Your Honor. It has to do with
23 the issues related to Attorney Troupis. Attorney Troupis is a
24 very significant witness for the plaintiffs, the Voces
25 plaintiffs, on the Section 2 claim. We have a straight effects

1 case under Section 2, but as a result of these documents that
2 we have been discovering, it's starting to become clear to us
3 that we have a theory that would implicate intent. The theory
4 is basically, if I may just simply describe why it's relevant,
5 is the theory that the Latino community was corralled by
6 partisan gerrymandering considerations external to the
7 community, and as a result the redistricting had to happen.
8 The relationship of Assembly 8 and Assembly 9 had to happen
9 within a certain confined area.

10 Many of the emails that have been discovered as a
11 result of the orders that have come out implicate this, and we
12 were able to explore it to a limited degree with Adam Foltz,
13 Tad Ottman and Joseph Handrick when they were asked, "Well,
14 yes, you can move 8 and 9 around however you wish, as long as
15 you stay within these boundaries." When the last round of
16 emails came out, Your Honor, we discovered that there was an
17 interaction between MALDEF and Attorney Troupis where the
18 concern was that MALDEF had drawn a map that didn't -- wasn't
19 confined to those boundaries, and the emails between Attorney
20 Troupis and the other members of the legal team and the
21 legislative aides to the leadership of the Legislature dealt
22 with this question of, well, that's going to have a ripple
23 effect, and we can't have that. They then went about
24 convincing MALDEF to go along with a map that had a vertical
25 horizontal -- north/south configuration, and as a result of

1 that --

2 MR. KELLY: Your Honor, I object. I object. He's
3 arguing his case before we have had any evidence come in. He's
4 making representations of fact that have no support. If he has
5 a question about our procedure starting in court tomorrow
6 morning, I think that's germane, but having his closing
7 argument before we even get to start the case I think is
8 inappropriate.

9 JUDGE STADTMUELLER: First of all, we did receive a
10 response from Mr. Troupis' counsel, Mr. Daughtery, and his
11 associate at Whyte Hirschboeck. Mr. Earle, are you prepared to
12 file your response to their opening brief in the morning?

13 MR. EARLE: Yes, we are, Your Honor, but if I may, on
14 Friday we received an email from Eric McLeod that attached to
15 it a very large number of emails that had been overlooked and
16 that had not been submitted to the court in connection with the
17 privilege log. Many of these emails involve Attorney Troupis.
18 Many of these emails go to the same issues that I was referring
19 to before Attorney Kelly objected. So the question here is
20 it's not about what kind of advice Mr. Troupis got from MALDEF,
21 it's a question about what kind of interactions Mr. Troupis had
22 with Eric McLeod, Tad Ottman and the others about how and why
23 they configured 8 and 9 the way they did. We think it goes to
24 intent that subordinated -- intentionally subordinated and
25 knowingly subordinated the interests of the Latino community.

1 It's absolutely critical that we be able to depose
2 Attorney Troupis before we proceed with the trial, and it's
3 that proposition that I'm raising here. Since it appears that
4 our opponents are not prepared to pursue further settlement
5 discussions or review by the Legislature, we would then ask
6 that the trial be adjourned at least long enough to allow us to
7 conduct the deposition of Attorney Troupis, assuming the court
8 would be so inclined to do so after we submit our writing
9 tomorrow. I raise it because it's a scheduling consideration
10 that we now have before us.

11 MR. KELLY: Your Honor, the discovery deadline passed
12 two weeks ago.

13 JUDGE STADTMUELLER: Mr. Kelly, in the interest of
14 fairness and justice, we have had enough of the charade and
15 mischaracterization. I don't mean to impugn either you or
16 anyone associated with this case, but as they say, the facts
17 are the facts. What has occurred here is beyond the pale in
18 terms of lack of transparency, secrecy, and at the end of the
19 day, as the court has commented earlier, it may not have
20 anything to do with the price of tea in China, but appearances
21 are everything, and Wisconsin has prided itself for one
22 generation after another on openness and fairness and doing the
23 right thing.

24 To be candid, we have seen everything but that in the
25 way this case has progressed. Not because of anything that you

1 did or Maria Lazar or anybody else, but the facts are the
2 facts, and so we're going to get to the bottom of the facts so
3 that the judges who are called upon to discharge their function
4 have all of the information before us that will result in a
5 fair, just and complete opinion. That's what this case is all
6 about. So to the extent that additional discovery is required,
7 it's going to happen. There may be some areas about which
8 Mr. Troupis will not have to testify because the
9 attorney-client privilege is appropriate, but we're not there
10 yet. We don't have all of the facts even to make that
11 determination this evening. Consistent with the way the judges
12 have approached this case, you are going to get a decision at
13 some point tomorrow, whether it's at 10:00 o'clock or
14 3:00 o'clock or some other time.

15 In the meantime, I'm going to direct that counsel
16 further brief this question whether this court has any
17 authority to rule on the concerns of the Legislature. I'm not
18 sure at this moment, because we're just beginning the analysis
19 as a result of your comments and some of my questions and my
20 colleagues' questions. As they say, a little bit of knowledge
21 can be a very dangerous thing, so we need to get a thorough
22 analysis, a thorough appreciation before we tread further into
23 what has become a rather treacherous course that we're
24 embarking on with what appears to be not an awful good look at
25 the road ahead because of one obstacle after another.

1 Again, I don't ascribe anything improper to any
2 lawyer or client, but many of these issues, had they been
3 discussed openly during the entire redistricting process, may
4 have led at the end of the process to an entirely different
5 result in terms of doing the right thing. Hopefully with
6 whether it's the guidance of this court or the guidance of good
7 lawyering and advocates to respective clients, hopefully we can
8 get there, but we can't get there on Tuesday evening,
9 February 21st.

10 MR. POLAND: Your Honor, may I make one other
11 request, please, if I may. In light of the e-mails that we did
12 just receive last week on Friday, some of them also involve
13 names of witnesses who the defendants are going to be calling
14 as experts. Professor Keith Gaddie was involved in the
15 redistricting process, and there are communications between
16 Mr. Gaddie and Troupis. Dr. Grafman, who's also a defendant
17 expert who will testify in the trial as an expert, also
18 received emails at some point in the process. We would very
19 much like to explore those communications in Mr. Troupis'
20 deposition, and so we think that it's appropriate that that be
21 done before those witnesses testify.

22 In addition, given the number of documents that have
23 come out in dribs and drabs along the way, including this last
24 slug of documents last Friday, we believe it would be
25 appropriate for the court to issue an order to the Legislature

1 to make a certification that its production is complete. We
2 think that would be appropriate here to avoid any additional
3 questions about whether it is, in fact, complete. Thank you.

4 THE COURT: All right. Well, on that score,
5 Mr. Poland, I would invite you to put that request in writing,
6 and perhaps the Legislature's counsel can respond to it
7 tomorrow morning. They are on the email list for motions, and
8 this transcript will be available in the morning, and we need
9 to get that.

10 MR. POLAND: Your Honor, I did make that request to
11 Mr. McLeod. He did send me an email saying that it was
12 complete. I don't recall exactly which day it was. I think it
13 might have been after I got the last of these emails. I think
14 that the force of a court order is probably more likely than my
15 simple email to get a serious response. I'm not suggesting it
16 wasn't serious, I believe Mr. McLeod was serious in his
17 response, but I am concerned about the completeness of the
18 production.

19 MR. EARLE: Your Honor, may I address the court?

20 JUDGE STADTMUELLER: Certainly.

21 MR. EARLE: Sharing the same concerns as Mr. Poland
22 and in light of Paragraph 12 in the Motion for Clarification
23 submitted by Mr. Troupis' attorneys, a certification request
24 has even more force because the question is whether Mr. Troupis
25 has, in fact, contributed his documents as counsel for the

1 Legislature and a participant in all of these myriad of
2 discussions. We have copies of emails from the recipients,
3 Eric McLeod and Tad Ottman and so forth, but it's not clear
4 that there's been a primary production from Mr. Troupis
5 himself.

6 JUDGE STADTMUELLER: All right. Well, I would
7 suggest, given the breadth and depth of our colloquy this
8 afternoon, that to the extent that there be further orders with
9 regard to the matter of production of documents or
10 certification that all documents requested have, in fact, been
11 produced, that those requests be put in writing and filed under
12 CMECF, and with what Mr. Poland has represented and so forth, I
13 have no doubt that Mr. McLeod will appropriately so certify.

14 Insofar as Mr. Troupis is concerned, until we resolve
15 the issue of the breadth and depth of any attorney/client
16 privilege, I think it would be inappropriate to drop the
17 gauntlet until we resolve that matter. If we receive your
18 response in the morning, we ought to be able to get something
19 out posthaste.

20 Insofar as Mr. Kelly's concerns and all of your
21 concerns, for that matter, and that is the question of whether
22 or not the Legislature can or cannot or has the authority or
23 doesn't have the authority to revisit the acts that are before
24 us, principally Act 43, I'm going to direct that counsel file
25 with the court not later than 8:00 o'clock tomorrow morning any

1 analysis or authority that deal with the question, because for
2 the moment, at least, I believe in conferring with my
3 colleagues through notes during this presentation, at least for
4 the moment the court has the authority to interpret state law,
5 and unless and until somebody suggests that we don't, then I
6 think whether the court -- that is, whether the Legislature
7 wants to opt in as opposed to continuing this litigation,
8 because it appears to the court that at the very earliest,
9 assuming we get the attorney-client privilege issue resolved,
10 at some point tomorrow there will be a discovery deposition
11 taken, which is going to draw counsel away from a trial
12 presentation, which means that in the best circumstance we're
13 not going to be prepared to proceed with the taking of
14 testimony in this case until Thursday. Then it becomes a
15 question of whether we can finish this week or whether it's
16 going to be continued, whether into next week or the week
17 after, because pretty soon, because of my colleagues' schedules
18 and my own schedule, we're now finding ourselves backed into
19 completing the trial the week of either March 12th or
20 March 19th.

21 So these are all imponderables at the moment, but at
22 some point they are going to become very ripe, and I hope,
23 unlike three-day-old fish, they won't become smelly.

24 JUDGE DOW: Wisconsin has always had two year
25 assembly sessions, is that right?

1 MR. SHRINER: Always is a long time, Your Honor.

2 JUDGE DOW: Since 1951?

3 MR. SHRINER: Since 1900 anyway.

4 JUDGE DOW: Okay. Because I see this act being
5 passed in 1951 and the new act coming along in 1953, which
6 would definitely be a new assembly session, and I see some
7 language in here saying at the very latest the Legislature's
8 power of revision passed at the day of the referendum, which
9 was November of 1952, which I believe would be the next
10 election. So I think there's probably an argument to be made
11 there, which you guys can make by the morning.

12 MR. SHRINER: Your Honor, I hate to be a squeaky
13 wheel here in the back, but if I may, it's my job, I'd like to
14 observe that I think none of the issues that are slowing things
15 down in Act 43 need slow us down in Act 44. Mr. Hassett has a
16 witness in town, Mr. Obey, who we can put on tomorrow. I can
17 bring Mr. Speth up. I think they are going to be the only fact
18 witnesses on Act 44. Again, you know what you want to do and
19 you will tell us, but I also continue respectfully to urge you
20 that we don't even need a trial on that, because it really
21 ought to be dismissed on the pleadings. It would uncomplicate
22 this case a bit, and I can see that that's something that the
23 court might be interested in, and I just make the suggestion
24 again.

25 JUDGE STADTMUELLER: All right. Well, I appreciate

1 the suggestion, Mr. Shriner, and we will, through staff, give
2 counsel some word on how we're going to deal with that perhaps
3 as soon as tomorrow afternoon. But, again, if Mr. Earle is
4 involved in a discovery deposition with Mr. Troupis, I can't
5 expect him to be here and there at the same time.

6 MR. SHRINER: He's not made any complaints against
7 Act 44.

8 MR. POLAND: I am, and the Baldus plaintiffs have a
9 Section 2 claim based on the Latino districts, as well, so any
10 deposition of Mr. Troupis that goes forward, I will need to be
11 there as lead counsel for the Baldus plaintiffs.

12 JUDGE STADTMUELLER: The other option, and knowing
13 your reputation in the area, I would really strenuously
14 encourage you to see if you can reach some sort of a
15 stipulation as to the testimony of these witnesses and we deal
16 with it on a written submission, if that's at all possible.

17 MR. SHRINER: We will talk about it, Your Honor. We
18 thought it would be easier all said, but that was then and this
19 is now. We will see what we can do.

20 JUDGE STADTMUELLER: All right. So the way we are
21 leaving it is there is no court call at 9:00 tomorrow morning,
22 but I would tell you all to be available on 45 minutes notice,
23 if the court is going to address the attorney-client issue here
24 in open court as opposed to a written opinion. Mr. Troupis and
25 his counsel should be made aware that the court may deal with

1 this from the bench as opposed to a written opinion. We're not
2 taking his testimony tomorrow, but it appears, at least from my
3 preliminary 10-minute scan of the emails, he is certainly going
4 to have to testify. The areas of inquiry still need to be fine
5 tuned. So there will be a deposition. Anything else anybody
6 wants to raise before we recess for the evening?

7 MR. KELLY: Not at this time, Your Honor.

8 JUDGE STADTMUELLER: Hearing none, the court stands
9 adjourned.

10 THE BAILIFF: All rise.

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1 UNITED STATES DISTRICT COURT)
2)SS
3 EASTERN DISTRICT OF WISCONSIN)
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5 I, KATHY A. HALMA, Official Court Reporter
6 for the United States District Court, Eastern District of
7 Wisconsin, do hereby certify that I reported the foregoing
8 proceedings and that the same is true and correct in accordance
9 with my original shorthand notes taken at said time and place.
10
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12 _____
13 KATHY A. HALMA
14 Official Court Reporter
15 United States District Court
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